THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION (C) NO.42 OF 2004

In the matter of an application under Article 226 of the Constitution of India

and

in the matter of

1. Kunga Nima Lepcha,
S/o Lt. Chungbu Lepcha,
R/o Tathangchen,
P.O. Raj Bhawan,
P.S. Gangtok,
East Sikkim.

2. Sonam Tshering Bhutia,
S/o Karma Bhutia,
R/o Upper Sichey,
Bye-Pass Road,
P.O. & P.S. Gangtok,
East Sikkim.

3. Balchand Sarda,
S/o Late Hetram Sarda,
R/o M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim. ..... **Petitioners**

Versus

1. State of Sikkim
represented by the Chief Secretary,
Government of Sikkim,
Gangtok,
East Sikkim.

2. The Secretary,
Land Revenue Department,
Government of Sikkim,
Gangtok,
East Sikkim. ..... **Respondents**

For the petitioners : Mr. M. Z. Ahmed, Senior Advocate assisted by Ms. B. Dutta, Advocate.

For the respondents : Mr. S. P. Wangdi, Advocate General assisted by Mr. J. B. Pradhan, Government Advocate and Mr. Karma Thinley, Government Advocate.

PRESENT: THE HON'BLE MR. JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

Last date of hearing : 12th August, 2005.

DATE OF JUDGMENT : 2nd September, 2005.

JUDGMENT

A. P. Subba, J

The present writ petition has been filed by three petitioners each of whom belongs to the Lepcha community, Bhutia community and the local plains community of the State respectively. By this writ petition, they challenge the validity of allotment of lands made and the agreements entered into with three non-local parties as well as others by the State-respondents in gross violation of Indo-Sikkim Treaty, 1950 and Article 371-F of the Constitution of India.

2. The case of the petitioners is that they are citizens of India and permanent residents of Sikkim. As permanent residents of the State they are extremely concerned with the allotment of land policy being presently

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It is the case of the petitioners that the above allotments have been made by the State-respondents in clear violation of the existing laws by completely ignoring the vital interest of the local people of the State of Sikkim and without any regard to the interest of the future generation.

3. The further case of the petitioners is that under the provisions of Indo-Sikkim Treaty, 1950 entered into between the Kingdom of Sikkim and the Government of India, any Indian national has the constitutional right to carry on trade and commerce in Sikkim, but if an Indian national wants to acquire, hold and dispose of any property, movable or immovable, for the purpose of his trade or residence in Sikkim, he must satisfy the Government before acquiring such property that he has in fact established himself in any trade in Sikkim. Such being the provision in the treaty in question, it is the constitutional and moral obligation of the Government of Sikkim to satisfy itself that such Indian national/party has actually or in fact established themselves in any trade in the State before taking a decision to grant any right to such Indian national to procure or acquire any property in Sikkim either by way of outright purchase or by way of grant of 99 years perpetual lease. Since the allotments of

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pursued by the State-respondents in the name of development of the State. Under such policy, permission being given to the outsiders to purchase prime immovable property for setting up industries within the State of Sikkim is adverse to the general interest of the local people. It is the further case of the petitioners that the State-respondents in recent times have been allowing certain multi-nationals to venture into Sikkim and have gone to the extent of either allotting or acquiring the scarce prime land of the State for allotting the same to such multi-nationals on the pretext of industrially developing the State and in doing so, they have not only totally ignored and neglected the basic rights of the local people but have also violated the provisions of the existing laws in force. In the process, it is further alleged, the State-respondents have arbitrarily and illegally allotted such prime lands to one M/s. Akshay Ispat and Ferro Alloys (Pvt. Ltd.) (AIFAL) at Mamring, South District, have granted perpetual lease in respect of about 4 acres of land in the same area to one M/s. SICPA (India) Ltd. and have also allotted forest land measuring over 25 acres at Pangthang near the capital of Sikkim to a non-local private party hailing from South India for the purpose of starting a five-star hotel resort.

prime lands were made and the agreements were executed by the State-respondents in favour of the above mentioned three non-local parties without complying with the provisions of the treaty and other relevant provisions of laws the actions of the State-respondents are violative of the provisions contained in Indo-Sikkim Treaty, 1950, Article 371-F of the Constitution of India, the Pollution Laws of the country and the Forest Laws. As such, the impugned allotment orders made and agreements executed in favour of the above-mentioned three outside parties as well as others are liable to be set aside and quashed.

4. In the counter-affidavit filed by the State-respondents, it was not denied that the State Government have granted permission to the three parties named in the writ petition to set up industries in the State of Sikkim. It was contended that Sikkim being one of the least industrially developed States in the country was heavily dependant on Central Government fund. Hence, it was necessary to identify the priorities and emphasise the desirability of achieving speedy industrial development, thereby generating adequate employment opportunities. It was in keeping with the policy of free industrialisation in the State as adopted by the State Government that the

said three parties have been given permission to set up their industries after duly complying with the relevant provisions under the related laws. It was, however, contended by raising a preliminary objection, that the writ petition was not maintainable as the issues raised pertain to the Indo-Sikkim Treaty, 1950 entered into between the then Independent Kingdom of Sikkim and the Government of India, which has now ceased to have any effect on the merger of Sikkim into Indian Union by virtue of 36th Amendment of the Constitution of India. It was accordingly contended that the issues raised by the writ petitioners pertain to matters over which the jurisdiction of the Courts in India have been specifically barred.

5. It was also contended that the writ petition was fundamentally based upon allegations against Industries Department, Income and Sales Tax Department, Labour Department, Power and Energy Department, Forest Department, State Control Pollution Board, Tourism Department, M/s. Akshay Ispat and Ferro Alloys (Pvt. Ltd.) (AIFAL), M/s. SICPA (India) Ltd. and other parties. Since none of these parties have been impleaded, the writ petition was liable to be dismissed on the ground of non-joinder of necessary parties. It was also contended that the present petitioners are not involved in any social

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activities with the objective of uplifting and protecting the rights and interest of the citizens of Sikkim and till date no such social activities for the upliftment of the citizens of Sikkim have been taken up by the petitioners. Hence, the petitioners without having any past record of rendering public services to their credit have filed the present writ petition with the sole purpose of achieving publicity and for gaining political ends. As such, the petitioners do not have any *locus standi* to file the present writ petition and the same is liable to be dismissed on the ground of lack of *locus standi* as well.

6. Mr. M. Z. Ahmed, learned senior counsel assisted by Ms. B. Dutta, learned counsel for the petitioners and Mr. S. P. Wangdi, learned Advocate General assisted by Mr. J. B. Pradhan, learned Government Advocate and Mr. Karma Thinley, learned Assistant Government Advocate for State-respondents were heard.

7. It is the submission of Mr. Ahmed, the learned senior counsel for the petitioners that Article 371-F of the Constitution of India is absolutely clear in as far as the question of maintaining the sanctity of whatever treaty or agreement that were executed between the erstwhile Sikkim Kingdom and the Government of India is

concerned. The Indo-Sikkim Treaty, 1950 was neither amended nor repealed and is still an existing law. Accordingly, it was the further submission of the learned counsel that the Indo-Sikkim Treaty, 1950 falls within the ambit and the scope of the term 'law' and the same has been protected by Article 371-F(k) of the Constitution inserted by the 36th Amendment of the Constitution. Mr. S. P. Wangdi, the learned Advocate General, on the other hand, controverted this contention and urged that the Indo-Sikkim Treaty, 1950 referred to and relied on by the petitioners long ceased to have any effect and operation after the Kingdom of Sikkim merged with the Union of India in the year 1975. As a result, neither the treaty falls within the definition of 'law' nor the same has been protected under the provisions of Article 371-F of the Constitution. It is also his submission that such matters have been specifically excluded from the jurisdiction of the Courts in India.

8. In order to appreciate the rival contentions raised by the learned counsel for respective parties, it is necessary, at the first instance, to notice the specific provision of the Indo-Sikkim Treaty relied on by the petitioners. The provision so relied on by the petitioners and contained in Article VII of the Treaty is as follows:-

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"Article VII

(1) Subjects of Sikkim shall have the right of entry into, and free movement within, India, and Indian nationals shall have the right of entry into, and free movement within, Sikkim.

(2) Subject to such regulations as the Government of Sikkim may prescribe in consultation with the Government of India, Indian nationals shall have:-

(a) the right to carry on trade and commerce in Sikkim; and

(b) when established in any trade in Sikkim, the right to acquire, hold and dispose of any property, movable or immovable, for the purposes of their trade or residence in Sikkim.

(3) Subjects of Sikkim shall have the same right –

(a) to carry on trade and commerce in India, and to employment therein; and

(b) of acquiring, holding and disposing of property, movable and immovable, as Indian nationals."

9. Article 371-F(k) of the Constitution which is the constitutional provision relied on by the learned counsel in the next place is as follows:-

"371-F(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;"

10. A bare perusal of the above provisions highlight the following:

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(i) That under the provisions of the Indo-Sikkim Treaty, 1950 the 'Indian nationals' had been given right to carry on trade and commerce in Sikkim as also to acquire, hold and dispose of any property for the purposes of their trade or residence in Sikkim when established in any trade in Sikkim. Correspondingly, the 'subjects of Sikkim' had been given similar rights to carry on trade or commerce in India which included right to employment and to acquire, hold or dispose of any property on a par with 'Indian nationals'.

(ii) That "all laws in force" immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof have been protected under Article 371-F of the Constitution and such laws shall continue to be in force till such time as they are amended or repealed by a competent legislature or other competent authority.

11. The questions for consideration is whether the Indo-Sikkim Treaty of 1950 is a 'law' and falls within the expression of "all laws in force" and if so whether it can be taken to have been protected under the provisions of

Article 371-F of the Constitution introduced by 36th Amendment to the Constitution of India. Secondly, whether such matters arising out of the treaty have been excluded from the jurisdiction of Courts in India.

12. For the sake of convenience, we may first take up the question as to whether Indo-Sikkim Treaty, 1950 falls within the ambit of the term 'law' and whether the treaty has been protected. As already noted above, while the submission of Mr. Ahmed is that the term 'law' includes within its ambit the Indo-Sikkim Treaty of 1950 and thus the treaty falls within the expression "laws in force", the submission of Mr. S. P. Wangdi, learned Advocate General is that the treaty does not fall within the definition of the expression 'law' and, as such, the Indo-Sikkim Treaty of 1950 cannot be taken to have been protected by Article 371-F of the Constitution.

13. In order to ascertain the correct legal position in this regard, the scope and ambit of the term 'law' assumes importance. The two statutes referred to by the parties for a definition of the expression 'law' are the following:-

1. Adaptation of Sikkim Laws (No.1) Order, 1975;
2. Sikkim Interpretation and General Clauses Act, 1977.

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The Adaptation of Sikkim Laws (No.1) Order, 1975 was issued by the President of India in exercise of the powers conferred by clause 1 of Article 371-F of the Constitution. The term 'law' as defined in the said 'Order' includes any enactment, proclamation, regulation, rule, notification or other instruments having immediately before the appointed day, the force of law in the whole or any part of the territory now comprised in the State of Sikkim.

Clause 2(c) of the said Adaptation of Sikkim Laws (No.1) Order, 1975 is reproduced as follows:-

> "2.(1)(c) "law" includes any enactment, Proclamation, Regulation, rule, notification or other instrument having, immediately before the appointed day, the force of law in the whole or any part of the territory now comprised in the State of Sikkim."

14. The term 'law' as defined in the Sikkim Interpretation and General Clauses Act, 1977 (Act 6 of 1977 is as follows:-

> "(26) "law" means any law, Act, Ordinance, Proclamation, regulation, rule, notification, order, by-law, scheme or other instrument having for the time being the force of law;"

15. It may be noticed from the above that the term 'law' has been defined in identical terms in both the

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statutes. It is noteworthy that the term 'treaty' finds no mention in both the definitions. Relying on the observation of the Apex Court in State of Sikkim vs. Surendra Prasad Sharma & Ors. Ors. reported in JT 1994 (3) SC 372 the specific contention of Mr. Ahmed is that, even though the word 'treaty' does not find place in the above definitions, the expression "other instruments having the force of law" occurring in the definitions under both the statutes includes within its scope and ambit the Indo-Sikkim Treaty of 1950. In view of this, the connotation of the said expression "other instruments having the force of law" assumes significance. However, it is to be noted that the said expression has not been defined in both the above mentioned Acts, namely, the Adaptation of Sikkim Laws (No.1) Order, 1975 and the Sikkim Interpretation and General Clauses Act, 1977.

16. Therefore, the only way to get at the correct meaning of the expression "other instruments having the force of law" is to look for the ordinary, natural and grammatical meaning of the word 'instrument'.

17. It appears that 'instrument' is a term of wide comprehension. In Black's Law Dictionary the word 'instrument' has been defined as a written legal document that defines rights, duties, entitlements, or liabilities, such

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as a contract, will, promissory note, or share certificate. In P. Ramanatha Aiyer's "The Law Lexicon" the term 'instrument' has been defined and has been assigned different meanings. Out of the several definitions given in the Law Lexicon the definition which is of general import is that the term 'instrument' is that it is a term used for a deed, writ or other legal proceedings or matters reduced to writing.

It may be noticed that both the above definitions being of generic significance are not helpful in determining the specific meaning of the expression 'instrument' so as to enable one to find out as to whether it includes a treaty within its ambit. Therefore, in order to arrive at the correct position it would be necessary to comprehend the meaning of the word 'treaty' in its ordinary sense. For this purpose reference to Black's Law Dictionary is once again called for.

18. The term 'treaty' has been defined in the said dictionary as follows:-

> "Formally signed and ratified agreement between two nations or sovereigns; and international agreement concluded between two or more states in written form and governed by international law. • A treaty is not only the law in each state but also a contract between the signatories."

19. Therefore, a 'treaty' as defined in the Black's Law Dictionary signifies a formally singed and ratified agreement between two nations or sovereigns. From this, it follows that even though the expression 'instrument' covers a legal document or agreement it does not comprehend a treaty. It is thus legitimate to conclude that the expression "other instruments" cannot include a treaty entered into between the two sovereign powers. Therefore, the Indo-Sikkim treaty of 1950 being an agreement between two different sovereign powers falls outside the ambit and scope of the definition of the term 'law' and of the expression "other instruments having the force of law". Hence, the contention raised by Mr. Ahmed, learned senior counsel for the petitioners cannot be countenanced.

20. In this regard, it would be useful to glance through the definition of the expression "all laws in force" occurring in Article 371-F of the Constitution. Although this expression has not been defined the same must, according to the observation of the Hon'ble Supreme Court in Surendra Prasad Sharma's case (supra), receive its ordinary, natural and grammatical meaning. Dealing with the implication of the expression "all laws in force" the Apex Court has observed as follows:-

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> "The latter part of the clause – 'until amended or repealed by a competent legislature or other competent authority' – is indicative of the fact that the said expression was not intended to be confined to only legislative enactments but also laws which could be altered or amended or repealed by 'other competent authority' i.e. other than the legislature itself. This supplies a clear indication that the said expression is wide enough to include subordinate legislation, e.g. Rules, Regulations, Orders, etc."
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> [emphasis added]

Referring to the definition of the expression "existing law" in Article 366(10) of the Constitution of India the Apex Court observed thus –

> The expression 'existing law' is defined by Article 366(10) to include any rule, regulation, bye-law, etc., and we think the expression 'all laws in force' means all existing laws.
>
> [emphasis added]

21. Article 366(10) of the Constitution referred to above by the Hon'ble Supreme Court is in the following terms:-

> "366.(10) 'existing law' means any law, Ordinance, order, bye-law rule or regulation passed or made before the commencement of this constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

22. It is clear from the above that the expression "all laws in force" even though held to be wide enough to include subordinate legislation, a treaty does not fall within

its scope. As observed by the Apex Court "all laws in force" means all existing laws. We have already noticed above that a treaty falls outside the ambit of 'law' and, therefore, it follows that it also falls outside the connotation of the expression "existing law".

23. Therefore, what emerges from the above discussion is that, from whatever angle the treaty is looked at, the same does not fall within the definition of law and the protection extended to "laws in force" under Article 371-F of the Constitution does not and cannot extend to the Indo-Sikkim Treaty, 1950.

24. Now coming to the question of jurisdiction of this Court in the matter before us, we may straightway refer to Article 371-F(m) of the Constitution which reads as follows:-

> "371-F(m) neither the Supreme Court nor any other court shall have jurisdiction in respect of any dispute or other matter arising out of any treaty, agreement, engagement or other similar instrument relating to Sikkim which was entered into or executed before the appointed day and to which the Government of India or any of its predecessor Government was a party, ..."

The above provision is too clear to leave any doubt that it constitutes a bar to interference by Courts in a

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dispute arising out of treaties, agreements, engagement or other similar instruments relating to Sikkim.

We cannot also loose sight of the well-settled position that a treaty entered into between two sovereign powers is an act of State. As held by the Apex Court law with regard to act of State is well-settled. To make the point clear, we can do no better than quote the following observation made by the Apex Court occurring in para 10 of the judgment in State of Haryana and Others vs. Amar Nath Bansal reported in AIR 1997 SC 718 -

> "10. ..... With regard to an act of State the law is well settled by the decision of this Court. The residents of the territories which are acquired do not carry with them the rights which they possessed as subjects of the ex-sovereign. As subjects of the new sovereign they possess only such rights as are granted or recognised by him. The process of acquisition of new territories is one continuous act of State terminating on the assumption of sovereign powers *de jure* over them by the new sovereign and it is only thereafter that rights accrue to the residents of those territories as subjects of that sovereign. No act done or declaration made by the new sovereign prior to his assumption of sovereign powers over acquired territories can quoad the residents of those territories be regarded as having the character of a law conferring on them the rights such as could be agitated in Courts. The clauses in a treaty entered into by the independent rulers providing for the recognition of the rights of the subjects of the ex-sovereign are incapable of

> enforcement in the Court of the new sovereign."
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> [emphasis added]

25. The legal position as highlighted above appears to be the precise reason as to why the Indo-Sikkim Treaty, 1950 has been excluded from the expression "all laws in force" occurring in Article 371-F of the Constitution. The reason for the exclusion of the jurisdiction of the Courts including the highest Court of the country in any matter concerning a treaty entered into between the Kingdom of Sikkim and the Government of India before the appointed day is, therefore, obvious. The rights which the petitioners have claimed under the relevant clause of the treaty cannot be agitated in Courts.

Moreover, it may be noted that even if the treaty were to be relied on, the provision contained in Article XII would come in the way of the petitioners. The said Article may be extracted as follows:-

> "Article XII
>
> If any dispute arises in the interpretation of the provisions of the Treaty which cannot be resolved by mutual consultation, the dispute shall be referred to the Chief Justice of India whose decision thereon shall be final."

Therefore, we are of the considered opinion that jurisdiction of this Court is barred in the present matter by virtue of the provisions contained in Article 371-F(m) of

the Constitution as well as Article XII of the Indo-Sikkim Treaty, 1950 itself.

26. Before we pass on to the next question, we may also consider the objection raised by the learned Advocate General on the ground of non-joinder of necessary parties. As already narrated above, the submission of learned Advocate General is that, apart from M/s. Akshay Ispat and Ferro Alloys (Pvt. Ltd.) (AIFAL), M/s. SICPA (India) Ltd. and the non-local private party in favour of whom forest land has been allotted at Pangthang, several departments of the State Government are the necessary parties.

Put in simple words, necessary party is one against whom there is some right to relief and whose presence is necessary for complete and effective adjudication of all questions involved in the cause. Considered in this light, it may be noted that the relief claimed in the writ petition being for setting aside of all the allotment orders and the agreements entered into by the State-respondents with the three non-local parties named above it goes without saying that all the above three parties are concerned in the relief claimed by the writ petitioners. Therefore, in our view, the above said three non-local parties, if not all the parties named by the State-respondents, would be

necessary parties. However, we do not find it necessary to go into any depth in the matter in view of our finding that this Court lacks jurisdiction by virtue of provisions contained in Article 371-F(m) of the Constitution as well as the Indo-Sikkim Treaty, 1950.

27. This brings us to the next submission made by Mr. M. Z. Ahmed. The learned counsel in the next place submitted that the petitioners have filed the present writ in the general interest of the local people of Sikkim so as to protect their rights and interest thereby suggesting that the present writ is more in the nature of public interest litigation than ordinary writ petition and that the petitioners have been motivated by the best of intentions in filing the present writ. However, best intention alone is not the only *sine quo non* of a public interest litigation. In order to bring an action in the nature of Public Interest Litigation, to protect general interest, the petition so filed is required to fall within the parameters laid down by Apex Court in the various decisions. Even though the public interest litigation was a new phenomenon in the country some decades ago, it is no longer a concept for which guidelines have yet to be evolved. In the decision of the Hon'ble Supreme Court rendered in Janata Dal vs. H. S. Chowdhary and Others reported in (1992) 4 SCC 305

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which contains discussions on the philosophy, mechanics and purposes of Public Interest Litigation the Apex Court in paragraph 64 has observed as follows:-

> "64. ..... The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right of locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury, but who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of community or disadvantaged groups and individuals or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration but acting bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *actio popularis* of Roman law whereby any citizen could bring such an action in respect of a public delict."

In paragraph 98 of the judgment, the Apex Court has further observed as follows:-

> "98. While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly-developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow its process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."
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> [emphasis added]

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28. In State of Himachal Pradesh vs. parent of a Student of Medical College, Shimla and Others reported in AIR 1985 SC 910 the Hon'ble Supreme Court has cautioned that public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that under the guise of redressing a public grievance it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.

Further, in one of the latest decisions rendered in Dattaraj Nathuji Thaware vs. State of Maharashtra and Others reported in (2005) 1 SCC 590, the Hon'ble Supreme Court in paragraph 14 of the judgment has observed as follows:-

> "14. The court has to be satisfied about (*a*) the credentials of the applicant; (*b*) the prima facie correctness or nature of information given by him; (*c*) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interests: (*i*) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (*ii*) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to

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> act ruthlessly while dealing with impostors and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *pro bono publico*, though they have no interest of the public or even of their own to protect." [emphasis added]

In paragraph 16 of the said judgment, the Apex Court has sounded a note of caution as follows:-

> "16. ..... a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilised for disposal of genuine cases." [emphasis added]

29. In view of the guidelines laid down above, it would be necessary, at the first instance to satisfy ourselves about the credentials of the petitioners in the present case. So far as their credentials are concerned, they have claimed that as permanent residents of Sikkim they are extremely concerned with the adverse land policy of the State-respondents. As already noticed above the State-respondents have strongly disputed such claim of the petitioners contending, *inter alia*, that the petitioners

absolutely lack any past record of having undertaken any social activities for the purpose of uplifting and protecting the rights and interest of the citizens of Sikkim. It has been asserted that they have no such record standing to their credit till date. Indeed, it is on this score that the *locus standi* of the petitioners have been challenged. This assertion of the State-respondents has not been controverted by the petitioners by citing any instance of social service performed, if any, by them in the interest of the general public. In the rejoinder the petitioners have only stated that the petitioners are public figures, they spent their entire lives in public duty and craved leave to establish through various records the purported public service done by them during the course of hearing, if deemed necessary. In view of such stand taken by the petitioners with regard to their credentials, this Court has been deprived of the benefit of any concrete instances of any public duty or social service done by them, if any, so as to evaluate the standing of the petitioners to see if they fall within the parameter of Public Interest Litigation laid down by the Apex Court in the decision cited above. However, we find it unnecessary to go into any depth on this issue as well, in view of our foregoing finding that this Court lacks jurisdiction in the matter. Even if we were to

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come to a conclusion on this issue we find it sufficient to say that on a careful consideration of all aspects of the case on the basis of the materials available on record, we are of the view that the present writ petition cannot fall within the true meaning and scope of Public Interest Litigation.

30. In the result, we find no merit in the writ petition and the same stands accordingly dismissed.

(A. P. Subba)
Judge
02-09-2005

31. While concurring with the findings and observations made by my brother Justice A. P. Subba, I am constrained to make the following observations to meet the ends of justice:-

In the related Treaty of 1950 entered between the Government of India and Maharaja of Sikkim, there are certain terms and conditions to be obliged and followed by both the countries at the relevant time before Sikkim was merged with the Indian Union. Article 371-F of the Constitution of India made special provisions with respect to the State of Sikkim. Sub-clauses (k) and (m) of Article 371-F are relevant in this instant case and accordingly, these are quoted below:-

"(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;

.....

(m) neither the Supreme Court nor any other court shall have jurisdiction in respect of any dispute or other matter arising out of any treaty, agreement, engagement or other similar instrument relating to Sikkim which was entered into or executed before the appointed day and to which the Government of India or any of its predecessor Governments was a party, but nothing in this clause shall be construed to derogate from the provisions of Article 143;"

32. In our considered view, the Treaty of 1950 cannot be termed as law or Ordinance or rule or regulation or instrument for both the present State of Sikkim and Government of India as it was mutual understanding and agreement between the two countries namely, the erstwhile Sikkim and Union of India for achieving certain goals. If we have to accept the argument of the learned counsel of the petitioner that the Treaty of 1950 is a law in force as on today, those terms and conditions contained in the Treaty shall be in force and shall continue. Now a reference is made to Articles X, XI and XII of the Treaty which are relevant and the same are reproduced as hereunder:-

"Article X

The Government of India, having in mind the friendly relations already existing between India and Sikkim and now further strengthened by this Treaty, and being desirous of assisting in the development and good administration of Sikkim, agrees to pay the Government of Sikkim a sum of rupees three lakhs every year so long as the terms of this Treaty are duly observed by the Government of Sikkim.

The first payment under this Article will be made before the end of the year 1950, and subsequent payments will be made in the month of August every year.

Article XI

The Government of India shall have the right to appoint a Representative to reside in Sikkim; and the Government of Sikkim shall provide him and his staff with all reasonable facilities in regard to their carrying out their duties in Sikkim.

Article XII

If any dispute arises in the interpretation of the provisions of this Treaty which cannot be resolved by mutual consultation, the dispute shall be referred to the Chief Justice of India whose decision there on shall be final."

33. Now, if the said Treaty of 1950 is in force, the Government of India is to pay Rs.3,00,000 (Rupees three lakhs) to the Government of Sikkim every year and all disputes shall be referred to the Chief Justice of India whose decision shall be final.

34. Article 366(10) of the Constitution of India provides the meaning of the "existing law" which means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation.

35. A bare perusal of the provision of law shows that the "existing law" does not include the "Treaty" which was in existence when Sikkim was an independent country. These legal aspects have been clarified by the Sikkim Interpretation and General Clauses Act, 1977 (in short, Act of 1977) inasmuch as Section 3(26) defines the term "law" which means any law, Act, Ordinance, Proclamation, regulation, rule, notification, order, bye-law, scheme or other instrument having for the time being the force of law. Apart from it, the Act of 1977 provides about the "Sikkim laws" which mean and include:-

(a) all laws in force in the territories comprised in the State of Sikkim or any part thereof immediately before the Commencement of the Constitution (Thirty-sixth Amendment) Act, 1975;

(b) all laws amending or repealing any such law referred to in sub-clause (a);

(c) all orders made and passed under clause (1) of Article 371F of the Constitution making adaptations or modifications of the

laws referred to in sub-clause (a) whether by way of repeal or amendment;

(d) all enactments in force in a State or some States in India with respect to matters in the State List or the Concurrent List of the Constitution not being Central Acts and extended to the State of Sikkim by notifications under clause (n) of Article 371F of the Constitution;

(e) all Ordinance promulgated by the Government of Sikkim;

(f) all Acts passed by the Sikkim Legislative Assembly which have received the assent of the Governor or the President;

(g) all laws made by parliament or the President in respect of the State of Sikkim under or in exercise of the powers conferred by Article 356 and Article 357 of the Constitution.

36. The term and word 'Treaty', particularly the present Treaty of 1950 in question does not find its place within the meaning of "existing law" under Article 366(10) of the Constitution and the "Sikkim Laws" under the Act of 1977. Henceforth, the Treaty of 1950 cannot be termed as law or Ordinance or instrument within the purview of Article 371-F(k) of the Constitution.

37. It has been revealed that in terms of the provisions of law contained in Article 371-F(m), this Court has no jurisdiction in respect of any dispute arising out of the related Treaty of 1950. It is needless to mention and highlight the fact that this related Treaty of 1950 cannot override the related constitutional provision laid down

(34)

under Article 371-F of the Constitution of India and that being the position, this writ petition is devoid of merit as well as the present writ petition is not maintainable and apart from that, necessary parties like M/s. SICPA India Ltd and others were not impleaded as party-respondents in the case in hand as highlighted above.

38. According to us, the basis of equity is that the judge must have a discretion to do justice in related cases as laws cannot be framed to cover all eventualities and equity is concerned with the reality of the situation and not with the formalities and it is concerned with the substance, not the form, and with the intention of the parties. At this stage, we hereby recall words of the eminent Jurist Lord Denning who brought common sense to the interpretation of the law. In the book "LORD DENNING a biography" written by Edmund Heward, we find the following words: -

> "In an article in The Times on 17 September 1980 J. R. Lucas of Merton College, Oxford, said:
>
> Although some think that the law should always be clear, in practice it is not, and we have recourse to judges for authoritative interpretations. The only question is whether in interpreting what is unclear the law should be guided by common sense and give weight to considerations of expediency, justice and morality. Lord Denning thinks it should. Other think not.
>
> Mr. Lucas argued that a non-common sense decision is no more certain than one

> based on common sense. For the layman the law would be more predictable if based on common sense. Since laws apply to laymen there is a good argument for the development of the law to be influenced by common sense as well as legal reasoning. In a doubtful case there is a strong case for the use of common sense as it makes the law easier to predict and worthier of respect. A perceptive paragraph appeared in the Sunday Mirror on 16 October 1966 : 'It is not that Lord Denning is excessively liberal. It is merely that he always seems to decide a case the way you or I would.... But an odd man out who has the gift of bending it [the law] in the right direction, is something for which we can be truly grateful'."

39. Keeping in view the observations made above, as well as basis of equity as highlighted above and our mind on good common sense, we are of the view that the present writ petition is devoid of merit and it deserves its outright dismissal and accordingly, it is dismissed with a cost of Rs.10,000/- (Rupees ten thousand) which shall be treated as part of the fund of Sikkim State Legal Services Authority and the Bar Association of Sikkim in equal share i.e. Rs.5,000/- (Rupees five thousand) each for which the petitioners are directed to deposit the same with the Registry of this Court within a period of one week from today and it is made clear that after deposit of such cost, the Member Secretary of Sikkim State Legal Services Authority and the Secretary, Bar Association of Sikkim or

Authority and the Secretary, Bar Association of Sikkim or its authorised officer is at liberty to withdraw the same from the Registry of this Court.

(N. Surjamani Singh)
Chief Justice (Acting)
02-09-2005

40. I agree.

(A. P. Subba)
Judge
02-09-2005